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CITATIONS

652586—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 102

RAYMOND J. GRACE, TRADING UNDER THE NAME AND STYLE OF R. J. & M. C. GRACE, PETITIONER

v.

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 42–46) and of the court of appeals (R. 68–71) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered March 19, 1945 (R. 72). The petition for a writ of certiorari was filed on June 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether individuals known as "coal hustlers" are petitioner's employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the district court (R. 56–60) are summarized as follows:

Petitioner is engaged in the retail coal business in the District of Columbia (R. 56).

The individuals described as "coal hustlers" are itinerant laborers who store coal sold by petitioner and delivered in one of his trucks to the homes or places of business of his customers. The coal hustlers usually congregate daily at petitioner's coal yard for the purpose of obtaining jobs of storing coal. They have no regular hours, are not required to report daily or at any stated time, and may go and come as they please. Many of them have followed this practice off and on for from four to twenty years. No quarters are furnished them, although petitioner permits them to build a fire in the coal yard in cold and inclement weather. When an order for coal is received and the customer wants

the coal stored, petitioner or one of his employees calls on the men congregated in the yard to take the job of storing the coal ordered. The men are not required to take any job offered and sometimes refuse particular jobs. When a job is accepted by one of the men, he is given a card showing the name and address of the customer and the number of tons of coal to be stored. He is usually taken to the place of the job by the truck carrying the coal, although he sometimes goes there by streetcar or by other means. After the coal is dumped in the alley or street, the coal hustler proceeds to store the coal. After the coal is stored, the coal hustler obtains the signature of the customer on the card which was furnished him by petitioner and then returns to petitioner's place of business where he is paid at the rate of 50 cents or 75 cents per ton. The amount so paid is usually added to and separately stated on petitioner's bill to the customer for the coal purchased and delivered. Where coal is sold by petitioner for cash on delivery, the cost of storing is usually added to the bill and after the coal is dumped the truck driver presents the bill to the customer, and collects the entire amount. The hustler is paid for the coal so stored upon his return to petitioner's office with a card signed by the customer. In some instances, in cash on delivery sales, the truck driver, after being paid for the coal and storage charges, returns the

amount charged for storing to the customer, who pays the hustler after the coal has been stored. (R. 58–60.)

Petitioner has no agreement or contract of any type with any of these men, reserving the right to supervise the work of storing or directing the manner in which they store the coal. The men furnish their own buckets and shovels. Petitioner has kept no record of the names and addresses of any of the men. They are not on his payroll. Petitioner makes no profit on the storage charges and carries no workmen's compensation or liability insurance on the hustlers. (R. 60.)

After paying the taxes involved for the taxable years 1936 to 1941, inclusive, the petitioner filed claims for refund which were disallowed by the Commissioner of Internal Revenue (R. 57–58). Petitioner instituted an action for recovery of the taxes in the district court (R.1–10), which entered judgment for the respondent (R. 63). The judgment of the district court was affirmed on appeal by the Court of Appeals for the District of Columbia (R. 72).

ARGUMENT

1. This case depends on its own facts, and was correctly decided by the court below. The principles properly applicable in a situation of the type here involved have been well stated by the Circuit Court of Appeals for the Fourth Circuit

in *United States* v. *Vogue, Inc.*, 145 F. 2d 609. In that case, in language quoted with approval by the court below in the instant case, it was pointed out that in determining the scope of the Social Security Act common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The applicability of such an act, enacted pursuant to a public policy unknown to the common law, is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. See also *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6).

Moreover, the court below correctly held that the record established petitioner's right to control and supervise coal hustlers not only as to the final result, but in the performance of the task itself, and that even under the common law concept of the employer-employee relationship this right, rather than the actual exercise of control or supervision, is the significant factor. *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518, 523.

2. While the decision below may in part be justified on the basis of the common law concept of the employer-employee relationship, we nevertheless are in substantial agreement with petitioner that the decision below, as well as the decision in the *Vogue* case, represents a funda-

mental conflict with the view followed by the Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Beard,* 141 F. 2d 376, certiorari denied, 323 U. S. 724, rehearing denied, April 2, 1945. In our petition for rehearing in the latter case we adverted to the conflict between that decision and the decision in the *Vogue* case in the Fourth Circuit, and we emphasized the importance of the question to the efficient administration of the Social Security Act and the revenue laws. In a supplemental memorandum filed in connection with our petition for rehearing we called the attention of the Court to the decision just then rendered below in the instant case, and pointed out that the conflict had by that decision been extended to include the District of Columbia. This Court, however, denied rehearing. In these circumstances, and believing the decision below to be correct, we submit that the petition herein should likewise be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CHESTER T. LANE,
FRED J. NEULAND,
Special Assistants to the Attorney General.

JUNE 1945.